

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
2 CENTRAL PUGET SOUND REGION
3 STATE OF WASHINGTON

4 ANN AAGAARD, JUDY FISHER, BOB
5 FISHER, GLEN CONLEY AND SAVE A
6 VALUABLE ENVIRONMENT (SAVE),
7 ,

8 Petitioners,
9

10 v.

11 CITY OF BOTHELL,
12

13 Respondent.
14

CASE No. 15-3-0001

**ORDER ON MOTIONS TO
SUPPLEMENT THE RECORD AND
MOTION TO STRIKE**

15
16 **BACKGROUND**

17 This matter came before the Board on Petitioners' March 17, 2015, Motion to
18 Supplement the Record (MTS) requesting to include additional maps and figures of the
19 geographic area in question and certain government studies, documents and regulatory
20 implementation manuals believed to be omitted from the City of Bothell's Amended
21 Proposed Record Index dated March 4, 2015. The Board had before it the following
22 submittals from the parties:
23

- 24
- 25 • Petitioners' MTS filed March 17, 2015.
 - 26 • Declaration of Allan Bakalian in Support of Petitioners' MTS, with Exhibits 1-7. These
27 exhibits include copies of proposed exhibits 88-97 and web links to government sites
28 containing the adopted actions Petitioners ask the Board to notice pursuant to WAC
29 242-03-630(4) or, alternatively, to admit as exhibits 98-104.
 - 30 • City of Bothell's Response to MTS, containing the City's MTS with a proposed
31 alternative map (proposed Exhibit 97a below) attached as exhibit "Bothell Map
32 Submittal" filed March 27, 2015.

- Petitioners' Reply, filed April 3, 2015, with exhibits proposing ten alternative documents (proposed Exhibits 104a-j) for supplementation in lieu of proposed Exhibit 104, three alternative maps proposed in lieu of Exhibits 93-95, and .
- The Declaration of Bob Fisher, authenticating Petitioners' proposed map exhibits 91-97 and proposed exhibits 104a-j, untimely filed April 8, 2015.
- The City of Bothell's Motion to Strike the Fisher Declaration, filed April 8, 2015.
- The City of Bothell's Sur-Reply, filed April 9, 2015, with proposed additional rebuttal map exhibits.

MOTION TO STRIKE

Petitioners timely filed their Motion to Supplement but the Declaration of Bob Fisher, in support of proposed Exhibits 91-97, was not attached to the motion and was received by the Board 5 days later. The City complains that the Declaration is untimely and that it would unduly prejudice the City should the Board consider it. City's Motion to Strike at 1.

The Board may allow late motions to supplement for such things as good cause and rebuttal evidence. WAC 242-03-56. In this instance, the Declaration helped clarify the source of various documents proposed by Petitioners. The Board has also considered the City's Sur-Reply such that the City had an opportunity to respond to the late submittal. Further, the Board has considered the City's late motions to supplement with rebuttal evidence.

The City's Motion to Strike is **denied**.

MOTIONS TO SUPPLEMENT

The Board bases its decisions on a jurisdiction's compliance with the Growth Management Act (GMA), State Environmental Policy Act or the Shoreline Management Act (SMA) on the basis of the record developed by the city, county, or state. RCW 36.70A.290(4); *Elizabeth Mooney and Janet Hays v. City of Kenmore and Dep't of Ecology*, GMHB Case No. 12-3-0004, Order on Motions to Supplement the Record (Dec. 10, 2012),

1 at 2. The index of the record should list "All material used in taking the action which is the
2 subject of the petition for review, including materials submitted in public comment." WAC
3 242-03-510(1). "To the extent such documents were submitted to the jurisdiction or a part
4 of the jurisdiction's proceedings prior to the challenged action, they are presumed
5 admissible subject to relevance." WAC 242-03-510(3).
6

7 Additionally, the Board may supplement the record if evidence not included in the
8 record is "Necessary or of substantial assistance to the board in reaching its decision." RCW
9 36.70A.290(4). WAC 242-03-565(1) specifies "A motion to supplement the record . . . *shall*
10 *state the reasons why* such evidence would be necessary or of substantial assistance to the
11 board in reaching its decision" (emphasis added). "[T]he burden is on the moving party to
12 demonstrate the evidence they wish to add is necessary or of substantial assistance to the
13 Board. To satisfy this burden, the moving party should explain what is in the evidence that
14 makes it relevant, how it is not available elsewhere in the record, and why consideration of
15 the additional evidence would be necessary or particularly helpful to the Board." *Mooney*,
16 GMHB Case No. 12-3-0004 at 4.
17

18 "The board may allow a later motion for supplementation on rebuttal or for other good
19 cause shown." WAC 242-03-565(1).
20

21 Exhibit 88: letter from A. Aagaard to Bothell City Council dated July 8, 2014.

22 Petitioners argue that this letter was submitted to the City during the legislative
23 proceedings that led up to the adoption of the challenged ordinance, Petitioners' MTS at 4,
24 and the City agrees that this document was inadvertently admitted from the Index. City's
25 Response to MTS at 3.
26

27 Exhibit 88 is **admitted** as Index #88.
28

29 Exhibit 89: letter from A. Aagaard to Council 11/13/2014

30 Petitioners argue that this letter was submitted to the City during the legislative
31 proceedings that led up to the adoption of the challenged ordinance. The City agrees and
32

1 notes that the letter is already included as Exhibit 80 in the Index. City's Response to MTS
2 at 3.

3 There being no need for duplicative index numbers, Exhibit 89 is **denied**.

4
5 Exhibit 90: The "Entire Ricketts file," including

- 6
- 7 • Ricketts Short Plat Approval/Staff Findings 10/4/2011.
 - 8 • Public Notice of Ricketts SEPA Mitigated DNS 5/9/2011.
 - 9 • SEPA Checklist for Ricketts Short Plat 12/3/2010.
 - 10 • Ricketts Critical Areas Alteration Permit/Staff Report 10/4/2011.
 - 11 • Hart Crowser Recommendations to Stan Kosick 4/13/2011.
 - 12 • Wetland Resources Critical Area Report/Habitat Assessment; Revision 2, Received
13 by City 8/30/2011.

14 Petitioners' state Ms. Aagaard specifically requested in her testimony that the entire
15 file be included in the record. Petitioners' MTS at 5. Although the City asserts that the
16 demand was unreasonable at the time, it does not opposed adding the entire file to the
17 Index.

18 The entire Ricketts file is **admitted as Index #90**.

19 Exhibits 91-94: GIS landscape map, North Creek Watershed Part 3, South; Part 2, Middle;
20 and Part 1, North (November 2014); North Creek Watershed and Subbasins.

21 Petitioners attest that these maps are from the official Snohomish County or
22 Washington state websites and are in the public record, and will be of substantial assistance
23 to the Board in understanding the geographic area that is the subject of this dispute by
24 providing detail regarding hydrologic systems and topography and other graphic
25 information. Petitioners MTS at 6-7.

26
27 The City objects that Exhibits 91-93 show areas mostly outside the City's jurisdiction
28 and do not provide the detail and clarity the Petitioners assert. Further, the City expresses
29 concern that the maps are potentially out-of-date, may be misleading depending on their
30 scale and which layers of GIS data were selected, and are missing their legends. The City
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1 further complains that Petitioners have not demonstrated how Exhibit 94 (map) will be of
2 substantial assistance but does not object. City's Response to MTS at 5-6.

3 Petitioners contend that showing the entire drainage basin is relevant to this case
4 because of the potential environmental degradation to the upstream watershed from
5 increased development in the planning area is relevant to whether spawning areas
6 upstream and outside of the planning area may be adversely impacted by stream
7 degradation, increased water temperatures, passageway blockage and sedimentation within
8 the City's planning area. Petitioners Reply at 4. Petitioners also submit the Declaration of
9 Bob Fisher attesting that he obtained the maps from the Snohomish County GIS data base
10 using the interactive tools from the website to enlarge the North Creek and Wood Creek
11 drainage basins and did not add or "Strip" any GIS layers. Declaration of Bob Fisher at 2,
12 Petitioners also provide alternative maps (referred to as 93 -95 in Petitioners' Reply but
13 listed as 93A, 92A, and 91A, respectively, in this order to accurately reflect the maps they
14 propose to replace), in lieu of Exhibits 91- 93. Petitioners' Reply at 2. The Board notes that
15 these are essentially the same maps but with the legend intact.
16

17 The City objects that Petitioners' alternative maps are still missing GIS layers
18 necessary to provide a more accurate understanding of the area and its current conditions
19 and so the City attaches a seven-part map¹ of the North Creek Watershed from the same
20 GIS website. City's Sur-Reply at 2. The City urges the Board to admit this new exhibit in
21 lieu of Petitioners proposed Exhibits 91-95, or substitute Exhibits 91A-93A.²
22

23 The Board appreciates some illustrative exhibits that provide general context for the
24 areas affected by the challenged action, but the City's concern as to currency of data
25 depicted is duly noted.
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27 **The parties may offer** Exhibits 91A, 92A, 93A, 94, and 105 with their briefs or as
28 illustrative exhibits at the hearing on the merits. However, all parties should be cautious in
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32 ¹ Referred to as Exhibit 105 in this Order.

² Using the Index numbers assigned in this Order.

1 relying on these exhibits to prove any facts in dispute. The Board will defer its final ruling on
2 Petitioners' MTS as to Exhibits 91A, 92A, and 93A until after the hearing on the merits.

3 Exhibits 91-93 are **denied**.

4 Exhibit 105 is **admitted** as Index #105 on rebuttal. WAC 242-03-565(1).

5
6 Exhibits 95 - 96: 2007 Aerial Map Permit/Zoning Map Coal Creek watershed, 220th to 236th,
7 Fisher dashes added to show approximate greenway (February 2015).

8 These are essentially the same map, with Exhibit 95 having red dashes added by Mr.
9 Fisher to Exhibit 95 (map) to depict "The approximate stream greenway." Exhibit 95.
10 Petitioners make the same general arguments in support of these maps as for Exhibits 91-
11 94 above. The City objects that the aerial photography was done in 2007 and is outdated,
12 and that Mr. Fisher has altered Exhibit 95. City's Response at 6; Declaration of Bob Fisher
13 at 2 (incorrectly referring to Exhibit 92); Petitioners' Reply at 4.

14 In reply, Petitioners offer Exhibit 96A, North Creek Watershed Overview (Nov 2014),
15 with the legend intact.

16 The Board does not see the relevance of the 2007 aerial views provided by Exhibits
17 95 and 96. Exhibit 96A is a completely new submission, Petitioners' Reply at 2, and is
18 untimely. Petitioners assert only that it provides "Greater specificity" but do not explain how
19 that will be of substantial assistance to the Board.

20 Exhibits 95, 96, and 96A are **denied**.

21
22 Exhibit 97: Snohomish County Zoning designations, N and E of Fitzgerald subarea
23 (February 2015)

24 Petitioners make no specific argument for Exhibit 97, including it under the same
25 general category as Exhibits 91-94 and asserting it will help the Board to understanding the
26 geographic area that is the subject of this dispute by providing detail regarding hydrologic
27 systems and topography and other graphic information. Petitioners MTS at 6-7.

28 The City objects that proposed Exhibit 97 is misleading in that it omits the relevant
29 GIS layer "Active development applications." City's Response to MTS at 6-7. Instead the
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1 City offers 2 pages of maps entitled "Bothell map Submittal – Snohomish County Zoning
2 Classifications, north and east of Fitzgerald/35th SE Subarea" with highlighting showing
3 active development applications. The Board has labeled this as Exhibit 97A. The City's
4 submittal is larger, depicts the streams and neighborhood and seems fairly self-explanatory,
5 but these maps also don't have the legend intact or a date other than "Current."

6
7 Petitioners have not carried their burden to show that Exhibit 97 will be of substantial
8 assistance. Exhibit 97 is **denied**.

9 The City's proposed Exhibit 97A suffers from many of the same defects the City cited
10 in objecting to Exhibits 91-97.

11 **The parties may offer** Exhibit 97A with their briefs or as illustrative exhibits at the
12 hearing on the merits. However, the Board will defer its final ruling on Exhibits 97A until
13 after the hearing on the merits.
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15 Exhibits 98 - 104:

- 16 • Exhibit 98: 2013-2018 Western Washington Phase II Municipal Stormwater Permit,
17 including Appendices 1-9.
- 18 • Exhibit 99: 2012 Stormwater Management Manual for W. Washington CD disc.
- 19 • Exhibit 100: 2014/2015 Action Agenda for Puget Sound; Freshwater and Terrestrial
20 Section.
- 21 • Exhibit 101: Land Use Planning for Salmon, Steelhead, and Trout: A land use
22 planner's guide to salmonid habitat protection and recovery. Knight. 10/2009.
- 23 • Exhibit 102: North Creek Fecal Coliform Bacterial TMDL, publication 03-10-047 DOE
24 9/2003.
- 25 • Exhibit 103: WIRA 8 Chinook Salmon Conservation Plan; Chapter 4, Conservation
26 Strategy and Chapter 11 Comprehensive Action List for North Lake WA.

26 Petitioners ask the Board to take official notice, pursuant to WAC 242-3-630(4), of
27 these seven documents³ representing scientific reports which they assert were relevant to
28 the action because they were "Widely available and of exactly the type the City would have
29 been expected to consult in meeting its obligation to ensure that all environmental impacts
30 were considered under SEPA." Petitioners' MTS at 8 (citing *Blair v. City of Monroe*, Order
31

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³ Assigned Index numbers 98-103, respectively, in this Order.

1 on City's Dispositive Motion and Petitioners' Motions to Supplement, GHMB No. 14-3-0006
2 (May 23, 2014) at 12).

3 The City responds that the Petitioners have not cited specific portions of these
4 voluminous documents and did not offer them to the City during the legislative process
5 leading up to the challenged action.

6 The Board agrees with Petitioners that Exhibits 98-103 are the type of scientific
7 information the City would have considered during the SEPA review and adoption of the
8 challenged Ordinance.

9 **Petitioners may offer** evidence from Exhibits 98-103, provided copies of the
10 relevant portions of the documents are attached to their prehearing brief.

11 *Note re Exhibit 99: The Board does not review CDs. Relevant evidence relied upon from*
12 *the CD must be transcribed and attached to the party's brief.*

13 Exhibit 104: Proposed Freshwater Assessment and 303(d) List for Washington State (March
14 18, 2015)

15 In addition to the parties' same arguments as for Exhibits 98-103, the City particularly
16 objects to Exhibit 104, which it asserts could not have been before the City as it was only a
17 draft, not yet adopted, report issued by Ecology on March 17, 2015, - well after the City's
18 November 24, 2014, adoption of Ordinance 2163 (2014). City's Response at 8-10; Sur-
19 Reply at 3-4.

20 In reply, Petitioners alternatively move to introduce historical stream water
21 temperature data allegedly compiled by DOE in preparation for the draft report as Exhibits
22 104a-j.⁴ Petitioners' Reply at 6-9. The City objects that Petitioners have not identified the
23 source of the data and that it is not contained in an adopted report.

24 Although the stream temperature data may have been collected years before the
25 challenged action, and may well be scientifically relevant, the Board agrees with the City.
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⁴ Assigned proposed Index #104a-j in this Order.

1 The data was published with the draft report. Not only was the report not adopted prior to
2 the City's adoption of the challenged ordinance, even the draft report had not been
3 published prior to the challenged action.⁵

4 Petitioners' motions to supplement with Exhibits 104 and 104a-j is **denied**.

6 ORDER

7 The City's Motion to Strike the Declaration of Bob Fisher is denied.

8 The Supplementation Tables below indicate the ruling of the Board with respect to
9 each of the documents requested for supplementation of the record.
10

11 Supplementation Table

13 Propose 14 d Exhibit 15 #	Exhibit Title	Order/Index #
16 88	Letter from A. Aagaard to Council 7/8/2014.	Admitted as #88
17 89	Letter from A. Aagaard to Council 11/13/2014.	Denied (Already # 80)
19 90	<ul style="list-style-type: none">• Ricketts Short Plat Approval/Staff Findings (October 4, 2011).• Public Notice of Ricketts SEPA Mitigated DNS 5.• SEPA Checklist for Ricketts Short Plat (December 3, 2010).• Ricketts Critical Areas Alteration Permit/Staff Report (October 4, 2011).• Hart Crowser Recommendations to Stan Kosick (April 3, 2011).• Wetland Resources Critical Area Report/Habitat Assessment; Revision 2 (Aug 30, 2011).	Admitted as # 90

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30 ⁵ See *Seattle Shellfish, et al., v. Pierce County and Department of Ecology*, CPSGMHB Case No. 09-3-0010,
31 Order on Motion to Supplement the Record (October 13, 2009), at 3-4, denying motion for official notice or to
32 supplement the record with USFWS and NMFS biological opinions concerning impact of geoduck aquaculture
on habitat for listed fish species where the BiOps were not published until after the County adopted and
Ecology issued its conditional approval of the County's shoreline master program amendment for aquaculture.

91	GIS landscape map, North Creek Watershed Part 3, S. (Nov 2014).	Denied
92	GIS landscape map, North Creek Watershed, Part 2, Middle (Nov 2014).	Denied
93	GIS landscape map North Creek Watershed, Part 1, N. (Nov 2014).	Denied
93a	GIS landscape map North Creek Watershed, Part 1, N. with legend (Nov 2014).	May Offer as #93A
94	North Creek Watershed and Subbasins, DOE.	Granted
94a	GIS landscape map, North Creek Watershed, Part 2, Middle with legend (Nov 2014).	May Offer as #92A
95	2007 Aerial Map Permit/Zoning Map Coal Creek watershed, 220 th to 236 th . Fisher dashes added to show approximate greenway (Feb 2015).	Denied
95a	GIS landscape map, North Creek Watershed Part 3, S. with legend (Nov 2014).	May Offer as #91A
96	2007 Aerial Map Permit/Zoning Map Coal Creek watershed, 220 th to 236 th (Feb 2015).	Denied
96a	North Creek Watershed Overview (Nov 2014) with legend.	Denied
97	Snohomish Co Zoning designations, N and E of Fitzgerald subarea (Feb 2015).	Denied
City's Submittal 97A	Bothell map Submittal – Snohomish County Zoning Classifications, north and east of Fitzgerald/35 th SE Subarea highlighting active development applications.	May offer as #97A
98	2013-2018 Western Washington Phase II Municipal Stormwater Permit, including Appendices 1-9.	May offer as #98
99	2012 Stormwater Management manual for W. Washington CD disc.	May offer as #99
100	2014/2015 Action Agenda for Puget Sound; Freshwater and Terrestrial Section.	May offer as #100
101	Land Use Planning for Salmon, Steelhead, and Trout: A land use planner's guide to salmonid habitat protection and recovery. Knight. 10/2009.	May offer as #101
102	North Creek Fecal Coliform Bacterial TMDL, publication 03-10-047 DOE 9/2003.	May offer as #102
103	WIRA 8 Chinook Salmon Conservation Plan; Chapter 4 and Chapter 11.	May offer as #103
104	Proposed Freshwater Assessment and 303(d) List for Washington State 3/18/2014.	Denied
104a	North Creek Water Temperature (Listing ID 7031).	Denied
104b	North Creek Water Temperature (Listing ID 72587).	Denied

104c	Wood Creek Water Temperature (Listing ID 7031).	Denied
104d	King County Routine Ambient and Wet weather Streams Monitoring near mouth (Study ID KCstrm-1).	Denied
104e	King County Routine Ambient and Wet weather Streams Monitoring 240 th St. SE (Study ID KCstrm-1).	Denied
104f	Lower North Creek TMDL action Plan North Creek near mouth (Study ID G0300107).	Denied
104g	Lower North Creek TMDL action Plan North Creek @ 240 th (Study ID G0300107) with figure plotting actual data.	Denied
104h	Snohomish Co Surface Water Management Fecal Coliform Bacteria TMDL Monitoring, North Creek at County line ((Study ID SNOCO_TMDLMONITORING).	Denied
104i	Snohomish County Surface Water Ambient Monitoring, North Creek @ County line ((Study ID WQASCAMB).	Denied
104j	Lower North Creek TMDL Action Plan, Wood Creek near mouth (Study ID G0300107).	Denied
105	City's seven-part map of the North Creek Watershed showing GIS layers.	Admitted as #105

DATED this 13th day of April, 2015.

Cheryl Pflug, Presiding Officer